IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~50~~ 14

STATE OF NORTH CAROLINA,

Appellant,

—v.—

HENRY C. ALFORD,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 268

CHARLES LEE PARKER,

Petitioner,

—v.—

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

BRIEF *AMICI CURIAE* ON BEHALF OF ALBERT BOBBY CHILDS, MARIE HILL, AND ROBERT LEWIS ROSEBORO

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Statement of Interest of the *Amici*

Amici Albert Bobby Childs,[1] Marie Hill,[2] and Robert Lewis Roseboro[3] are North Carolina prisoners under sentences of death. When charged with a capital crime, each was given by North Carolina statutory practice the choice of pleading guilty, thereby assuring a sentence of life imprisonment, or of risking the death penalty after jury trial upon a plea of not guilty. Each pleaded not guilty and, upon conviction, was sentenced to die.

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[1] Albert Bobby Childs is a 46 year old Negro man. Charged with the crimes of rape and burglary, he pleaded not guilty, was convicted and sentenced to death by a jury in the Superior Court of Buncombe County in November, 1965. His conviction and sentences of death were affirmed on appeal, *State* v. *Childs*, 269 N. C. 307, 152 S. E. 2d 453 (1967). In June, 1967, he filed a petition for a post-conviction hearing in the Superior Court. He raised an issue under *United States* v. *Jackson, infra*, which the Superior Court resolved by ruling that *Jackson* was inapplicable and that his death sentence was constitutional. The Court of Appeals of North Carolina refused to review the Superior Court on certiorari and Childs thereafter filed a petition for certiorari in this Court which is now pending. *Childs* v. *North Carolina*, O. T. 1969, No. 25 Misc.

[2] Marie Hill is a 17 year old Negro girl. Charged with the crime of murder, she pleaded not guilty, was convicted and sentenced to death by a jury in the Superior Court of Edgecombe County in December, 1968. She now has an appeal pending in the Supreme Court of North Carolina wherein she urges that her death sentence is void as a penalty on the exercise of her constitutional rights. *State* v. *Hill*, No. 2, Fall Term, 1969.

[3] Robert Lewis Roseboro is a 16 year old Negro boy. Charged with the crime of murder, he pleaded not guilty, was convicted and sentenced to death by a jury in the Superior Court of Cleveland County in May, 1969. In his pending appeal in the Supreme Court of North Carolina, he urges the unconstitutionality of his sentence of death on grounds identical to those asserted by Marie Hill. *State* v. *Roseboro*, No. _____ Fall Term, 1969.

Each is now challenging the death sentence imposed upon him as a penalty attached to the exercise of his constitutional rights to plead not guilty and to be tried by a jury, invoking *United States* v. *Jackson,* 390 U. S. 570 (1968). The United States Court of Appeals for the Fourth Circuit has vindicated this constitutional contention in *Alford* v. *North Carolina,* No. 50, by holding that the capital punishment provisions of North Carolina law are indeed unconstitutional by force of *Jackson.* The State bases its appeal to this Court upon the proposition—not necessary to decision of the case below or here, but nevertheless strongly urged in North Carolina's jurisdictional statement and brief—that the Fourth Circuit erred in this constitutional decision, which would have the effect that *amici's* death sentences could not be carried out.[4] *Amici,* therefore,

[4] *Amici*'s position is that the death sentences imposed upon them, under a procedure that taxed their constitutional rights to defend with the penalty of death, are unconstitutional. In that regard, they urge that the Supreme Court of North Carolina was plainly wrong when it held in *State* v. *Atkinson,* —— N. C. ——, 167 S. E. 2d 241 (1969) that the effect of a declaration of the unconstitutionality of the North Carolina capital statutory scheme under *Jackson* would be to eliminate the provision whereby capital defendants could save their lives by pleading guilty, rather than to invalidate death sentences imposed upon defendants who entered not guilty pleas. This is so because, by whatever state-law "separability" doctrines North Carolina seeks to correct the constitutional vice of its statutory scheme for the future, no notion of "separability" can change the unconstitutional choices offered by that scheme in the past. Guilty pleas at the time amici were required to plead were lawful and were regularly being accepted by the courts of North Carolina. There was then no legal impediment to amici's proffering guilty pleas which, upon acceptance by the court, would have assured them immunity from the death penalty. Nothing which the State of North Carolina may announce *ex post facto* can effect in any way this statutory pattern that confronted amici when on trial for their lives. No ruling now can unwrite the statutes that then confronted them, disestablish the options unconstitutionally presented for their choice, unmake the

have a life-or-death interest in the appeal, since any decision that would reverse the Fourth Circuit by holding *Jackson* inapplicable in North Carolina would thereby destroy the promise of life which *Alford* has held out to them.

Statement

These two cases present a common question for decision: in what circumstances a guilty plea to a capital charge must be set aside on the ground that it is "involuntary," improperly coerced by the threat of the death penalty if the defendant elects to plead not guilty and is convicted. In *North Carolina* v. *Alford*, No. 50, the Court of Appeals for the Fourth Circuit found as a fact that the defendant's

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choice they made, or diminish the significance of that choice. All that any court can do at this point in time is to relieve persons condemned under this scheme from the unconstitutional consequence of the unconstitutional procedure under which they were sentenced to death—that is, the death sentence. See the petition for writ of certiorari in *Forcella and Funicello* v. *New Jersey*, O. T. 1969, No. 18 Misc., pp. 35-37.

We add that it seems plain to us, *contra* the reasoning in *State* v. *Atkinson, supra*, that *amici* have standing to claim the benefits of *Jackson*. A plainer instance of standing, indeed, could hardly be imagined: amici are challenging sentences of death imposed upon them under an unconstitutional statute as penalties for the exercise of constitutional rights. That they resisted the pressure of threatened death and exercised their constitutional rights at the jeopardy of their lives is hardly a ground for denying them standing to complain when their lives are taken in consequence. See *State* v. *Atkinson, supra*, 167 S. E. 2d, at 259-260. If this proposition was at all debatable prior to this Court's decision in *North Carolina* v. *Pearce*, —— U. S. ——, 23 L. Ed. 2d 656 (1969), it is no longer. See *Pope* v. *United States*, 392 U. S. 651 (1968) (per curiam); Petition for Writ of Certiorari in *Childs* v. *North Carolina*, O. T. 1969, No. 25 Misc., pp. 23-25; Petition for Writ of Certiorari in *Forcella and Funicello* v. *New Jersey*, *supra*, pp. 29-35.

plea was involuntary, the undisputed evidence showing that "he pleaded guilty . . . to avoid possible imposition of the death penalty," 405 F. 2d 340, 348 (4th Cir. 1968). In *Parker* v. *North Carolina,* No. 268, the Court of Appeals of North Carolina affirmed the denial of a petition for post-conviction relief which contended that the defendant had been coerced into pleading guilty by the threat of the death penalty.

The defendants[5] in each of these cases rely heavily on *United States* v. *Jackson,* 390 U. S. 570 (1968), and *Pope* v. *United States,* 392 U. S. 651 (1968) (per curiam), in which this Court invalidated the death penalty provisions of the Federal Kidnaping Act and the Federal Bank Robbery Act respectively. Those statutes were invalidated because, by allowing a defendant who pleaded guilty (or waived jury trial) to escape the risk of the death penalty, they "needlessly encourage[d]" (390 U. S., at 583) waiver of the constitutional rights to plead not guilty and have a jury trial. The Court of Appeals in *Alford* began its constitutional analysis with a determination that North Carolina's death penalty statutes—which like the federal statutes in *Jackson* allowed avoidance of any risk of the death penalty by a plea of guilty—were unconstitutional. North Carolina has vigorously challenged that conclusion in this Court. Its position that *Jackson* does not invalidate the North Carolina capital sentencing scheme has been sustained not only by the State's Court of Appeals in *Parker,* but also by the North Carolina Supreme Court in *State* v. *Peele,* 274 N. C. 106, 161 S. E. 2d 568 (1968); *State* v.

[5] We use the term "defendant" throughout to refer to the defendant in the original criminal proceeding—the appellee in *Alford* and the petitioner in *Parker.*

Spence, 274 N. C. 536, 164 S. E. 2d 593 (1968); *State* v. *Atkinson,* —— N. C. ——, 167 S. E. 2d 241 (1969).

It bears noting that the constitutionality of the North Carolina death penalty statutes is not necessarily involved here; the ultimate question presented is simply whether the guilty pleas of Alford and Parker were "voluntary." A plea may obviously be involuntary even though the statutory setting in which it was entered is constitutional; conversely, it is perfectly possible that a defendant might, for reasons having nothing to do with a desire to avoid the death penalty, enter a voluntary plea in a jurisdiction in which the death penalty statutes suffer from a *Jackson*-like infirmity. However, the fact is that the North Carolina statutes *are* unconstitutional under *Jackson,* and that circumstance plays a critical part in our analysis of these cases. For that reason—and because *amici's* lives may literally depend upon the recognition that the death penalty statutes of North Carolina are unconstitutional—we discuss the constitutionality of those statutes in Part I. In Part II, we consider the specific question presented in these cases—namely, whether the defendant who has pleaded guilty in a capital case may have that plea set aside if it can be shown that the plea was motivated by fear that the death penalty would be imposed if he stood trial.

Summary of Argument

The death penalty provisions of North Carolina law are unconstitutional under *United States* v. *Jackson,* 390 U. S. 570 (1968), because only a defendant who pleads not guilty may be sentenced to die. Such a scheme needlessly encourages guilty pleas and penalizes those choosing to ex-

ercise their constitutional rights to deny and contest guilt. This conclusion is not disturbed because defendants do not have an absolute right to plead guilty under North Carolina practice for neither did defendants under the federal procedure invalidated in *Jackson*. No more pertinent is the fact that in North Carolina—unlike the federal procedure before the Court in *Jackson*—a defendant cannot *also* avoid the death penalty by waiving jury trial on a plea of not guilty. *Jackson* condemned undue pressures upon Fifth as well as Sixth Amendment rights; and a statutory scheme which informs a defendant that to escape all risk of death he must plead guilty, thereby waiving *both* his right to defend and his incidental right to jury trial, is more, not less, obnoxious to the Constitution than the practice that *Jackson* invalidated.

The Constitution requires that a guilty plea must be "voluntary" to be valid. Under this principle, certain kinds of pressures and inducements to plead guilty are deemed so inherently coercive as to be impermissible as a matter of law. The threat of execution, suspended if a guilty plea is interposed, is such an inducement. Where by statute the state offers those entering a plea of guilty immunity from the death penalty, pleas entered under the statute are suspect and must be set aside unless (1) it affirmatively appears from the record of the original proceedings that the plea was motivated by permissible considerations (*Boykin* v. *Alabama*, —— U. S. ——, 23 L. Ed. 2d 274 (1969)); or, alternatively, (2) the plea is determined to have been motivated by considerations other than threat of the death penalty at a proper evidentiary hearing at which the burden of proof is imposed upon the State.

ARGUMENT

I.

A Statutory Scheme Which Subjects to the Risk of the Death Penalty Only Those Defendants Who Elect to Stand Trial on the Issue of Guilt, and Which Forbids the Imposition of Death Upon Those Defendants Who Waive Their Constitutional Rights to Deny and Contest Guilt, Is Unconstitutional.

A complete description of the North Carolina statutory scheme at issue here is set out in the petition for a writ of certiorari filed in *Childs* v. *North Carolina,* O. T. 1969, No. 25 Misc., at pp. 16-17. It will suffice to say that in North Carolina, a defendant who pleads not guilty to a capital charge may be sentenced to death in the discretion of the jury upon conviction. In contrast, the defendant who waives the right to trial and pleads guilty—with the approval of the court and prosecution—wholly avoids the death penalty, and the punishment is automatically fixed at life imprisonment. N. C. Gen. Stat. §15-162.1.

As in *Jackson,* defendants may thus avoid the death penalty in a capital case by waiving the constitutional right to deny and contest guilt—and with it all of the constitutionally guaranteed procedural protections subsumed within the right to trial. In *Jackson,* this Court was confronted with a comparable legislative scheme, under which the defendant could avoid the legislatively authorized death penalty by waiving either or both of two constitutional rights: (1) the Fifth Amendment right not to plead guilty, to deny and contest guilt; and (2) the Sixth Amendment right to a trial by jury. This scheme was held unconstitutional:

"The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional. But, as the Government notes, limiting the death penalty to cases where the jury recommends its imposition does have another objective: It avoids the more drastic alternative of mandatory capital punishment in every case. In this sense, the selective death penalty procedure established by the Federal Kidnaping Act may be viewed as ameliorating the severity of the more extreme punishment that Congress might have wished to provide.

"The Government suggests that, because the Act thus operates 'to mitigate the severity of punishment,' it is irrelevant that it 'may have the incidental effect of inducing defendants not to contest in full measure.' We cannot agree. Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . . The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive. In this case the answer to that question is clear. . . . Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right. See *Griffin* v. *California*, 380 U. S. 609." (*Id.* at 581-83.)

There may be identified four arguments which have been advanced in various quarters by those seeking to distinguish and avoid *United States* v. *Jackson* as respects death penalty provisions like North Carolina's.[6] The fountainhead of these arguments is the opinion of the New Jersey Supreme Court in *State* v. *Forcella,* 52 N. J. 263, 245 A. 2d 181 (1968), whose extremely restrictive interpretation of *Jackson* is presently pending for review here on a petition for certiorari *sub nom. Forcella and Funicello* v. *New Jersey,* O. T. 1969, No. 18 Misc.

(1) It is argued that the challenged provisions are "primarily for the benefit of a defendant" (*State* v. *Peele,* 274 N. C. 106, 161 S. E. 2d 568, 572 (1968); see also Brief for Appellant, *North Carolina* v. *Alford,* No. 50, at p. 8), and are designed to operate "to the benefit of defendants as a group. The purpose is humane, and so is its overall impact." *State* v. *Forcella,* 52 N. J. 263, 280, 245 A. 2d 181, 190 (1968).

(2) Defendants in North Carolina do not have an absolute right to plead not guilty and thereby avoid the possible imposition of the death penalty. As in New Jersey, a plea that would escape the death penalty may be accepted only by leave of the prosecution and the court. This, the New Jersey Supreme Court thought, distinguishes state practice from the federal where (again, as that court viewed it) a capital defendant "has a 'right,' in a realistic sense, to plead guilty." *Id.* 52 N. J., at 279. See also *State* v. *Peele, supra,* 161 S. E. 2d, at 572 ("The State, acting through its solicitor, may refuse to accept the plea, or the judge may decline to approve it.").

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[6] See note 9, *infra.*

(3) The New Jersey Supreme Court also argued that, *because* under the New Jersey-North Carolina procedure, a waiver *only* of the right to a jury trial (by pleading not guilty and submitting to court trial) is not possible, the Sixth Amendment is not burdened by the death penalty. Only the Fifth Amendment right not to plead guilty and to deny and contest guilt is taxed with the risk of a death sentence. *State* v. *Forcella, supra,* 52 N. J., at 271-275. Although recognizing that this Court's opinion in *Jackson* plainly referred to an infringement of both the Fifth and Sixth Amendments, the New Jersey Supreme Court concluded that "the two propositions were . . . intertwined, thus suggesting that not all members of the majority were ready to say that a statute which did no more than limit the penalty upon acceptance of a guilty plea must violate the Fifth Amendment." *Id.,* 52 N. J. at 272. *Jackson* is thus reducible, the court said, to a determination that "the federal statute obviously ran afoul of the Sixth Amendment." *Id.,* 52 N. J., at 272.

(4) The North Carolina Supreme Court's opinion in *State* v. *Peele, supra,* urges that under the Federal Kidnaping Act, "the law fixes imprisonment in the penitentiary, but provides that the jury may impose the death penalty." 161 S. E. 2d, at 572. This is supposedly to be construed with the North Carolina statute which, as the court viewed it, "provides that the death penalty shall be ordered unless the jury, at the time it renders its verdict of guilty . . . fixes the punishment at life imprisonment." *Id.*

We turn to an examination of each of these four arguments against the application of *Jackson.*

(1) *The Benevolent Intent of the Legislature.* It is not necessary to question the conclusion of the North Carolina Supreme Court that the statutory scheme which permits a defendant to avoid the death penalty by pleading guilty was conceived for the benefit of defendants generally. Nor do we doubt the statement of the New Jersey Supreme Court that the similar provisions of that State's law were intended as a humane procedural device. But this Court's analysis in *Jackson* began with a recognition that the same might be said of the procedure imposed by the Federal Kidnaping Act, whose sentencing provisions "may be viewed as ameliorating the severity of the more extreme punishment that Congress might have wished to provide." 390 U. S. at 582. The Court's rejection of the legislative motive as a basis for upholding these procedures was nonetheless unequivocal:

> "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. Cf. *United States* v. *Robel,* 389 U. S. 258; *Shelton* v. *Tucker,* 364 U. S. 479, 488-89. The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive. In this case, the answer to that question is clear. The Congress can of course mitigate the severity of capital punishment. The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing these defendants who plead not guilty and demand jury trial. . . . Congress cannot impose such a penalty in a manner

that needlessly penalizes the assertion of a constitutional right. See *Griffin* v. *California,* 380 U. S. 609." (*Id.,* at 582-83.)

Jackson, then, squarely holds that the humanitarian motives of the legislature do not save a statutory scheme which operates to penalize "defendants who plead not guilty and demand jury trial." *Id.*

(2) *The Plea of Guilty Can Only Be Made With the Consent of the Court.*

The North Carolina and New Jersey practice, in theory at least,[7] confers upon the trial judge the power to reject the defendant's plea, thus forcing him to stand trial for his life. This, it is said, distinguishes those statutory procedures from the federal practice condemned in *Jackson.* That conclusion supposes what is not in fact the case, for under federal practice it is clear that the consent of the trial judge (and, for that matter, the prosecutor) is required for *either* a guilty plea or a jury waiver in a Kidnaping Act case. See *United States* v. *Jackson, supra,* at 584; *Singer* v. *United States,* 380 U. S. 24 (1965); *Lynch* v. *Overholser,* 369 U. S. 705, 719 (1962); see also *United States* v. *Cox,* 342 F. 2d 167, 190-193 (5th Cir. 1965) (Wisdom, *J.,* concurring).

The point, of course, is that the judge's power to reject the defendant's life-assuring plea and its incidental waiver

[7] The opinion of Justice Jacobs and Hall, dissenting in *State* v. *Forcella, supra,* 52 N. J. at 294, tells us what the majority of the court in that case neither affirms nor denies—namely, that the theoretical power of New Jersey trial judges to reject a proffered *non vult* plea is "seldom exercised where the prosecutor has recommended its acceptance."

of federal rights is simply irrelevant. Even if North Carolina and New Jersey trial judges may and occasionally do reject the plea, the defendant is still encouraged to attempt or offer to plead guilty on the hope that his plea will be accepted and his salvation thus secured. On the one hand, "the defendant convicted by a jury automatically incurs a risk that the same jury will recommend the death penalty . . ." (*United States* v. *Jackson,* 390 U. S. at 573, n. 6); on the other, he "completely escapes the threat of capital punishment unless the trial judge makes an affirmative decision" (*id.*) to subject him to it by rejecting his offer to plead guilty. As *Jackson* makes unmistakably clear, this differential risk of capital punishment is unconstitutional.

(3) *The Waiver of Jury Trial Alone Does Not Avoid the Possible Imposition of the Death Penalty.* In North Carolina and New Jersey, the defendant who pleads not guilty to a capital crime cannot avoid the possible imposition of the death penalty by waiving his right to a jury trial, as could a defendant pleading not guilty under the Federal Kidnaping Act. The New Jersey Supreme Court thought this enough to distinguish *Jackson* even though North Carolina and New Jersey defendants could avoid any possibility of the death penalty—as could federal defendants under the Kidnaping Act—by entering a plea of guilty. *State* v. *Forcella, supra,* at 269-270. This narrow view of *Jackson* has not, to our knowledge, found acceptance in any other court. It is inconsistent with the decision of the South Carolina Supreme Court in *State* v. *Harper,* 162 S. E. 2d 712 (1968),[8] and, of course, with that of the Fourth

[8] The South Carolina Supreme Court found that the statutory provisions challenged in *Harper* allowed a defendant to escape the

Circuit in *Alford*. If the distinction taken by the New Jersey Court prevails, it will deprive *Jackson* of all meaning with respect to the capital sentencing practices of the states.[9] But it cannot prevail without distortion of the principles discussed in *Jackson* and of the constitutional values on which that decision rests.

To begin with, the premise of the New Jersey Supreme Court that only the Fifth Amendment right to deny and contest guilt, and not the Sixth Amendment right to jury trial, is involved is simply incorrect. By pleading guilty—the only method in North Carolina and New Jersey by

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risk of the death penalty by pleading guilty with the approval of the trial court. On a not guilty plea, a jury might impose capital punishment. The question of waiver of jury trial on the plea of not guilty was not involved. This scheme, the Court held, was condemned by *Jackson;* and it resolved the constitutional dilemma by voiding the provision which excluded the death penalty on a guilty plea. *Harper* arose, as did *Jackson,* on a pretrial motion; thus, the South Carolina court was not required to decide the implications of its holding for condemned men who, like *amici,* pleaded not guilty and were sentenced to death during the period when they might still have escaped that sentence by a guilty plea.

[9] Our research has disclosed no States in which the defendant may avoid the death penalty by waiving his right to a jury trial and accepting court trial on a not guilty plea. There are to our knowledge seven states in which a capital defendant may avoid the death penalty by pleading guilty: they are (1) Louisiana (La. Code of Crim. Proc. Art. 557); (2) Mississippi (Miss. Code §§2217, 2536; see *Bullock* v. *Harpole,* 102 So. 2d 687 (1958)); (3) New Jersey (N. J. S. A. §§2A:113-3, 113-4); (4) New York (N. Y. Code of Crim. Proc. §3321); (5) North Carolina (N. C. Gen. Stat. §15-162.1); (6) South Carolina (S. C. Code §17-553.4 (1967) Cum. Supp.); and (7) Wyoming (Wyo. Stat. §7-195) (kidnaping). See also N. H. Rev. Stat. Ann. §§585.4, 585.5. We are unsure of the law in the states of Nebraska, see Neb. Rev. Stat. §28-417 (kidnaping); Washington, see Rev. Code of Wash., Title 9, §9.52.010 (kidnaping); and Texas, see Vernon's Ann. Code of Crim. Proc. of Texas, Art. 1.14, as amended, Tex. Acts 1967, p. 1733, ch. 659, §1, effective August 28, 1967.

which the defendant can avoid all risk of the death penalty —the defendant waives *all* procedural protections which the Constitution affords defendants in a criminal trial (*McCarthy* v. *United States,* 394 U. S. 459 (1969)), among them the right to trial by jury. This point was recently emphasized by the Court in *Boykin* v. *Alabama,* —— U. S. ——, 23 L. Ed. 2d 274, 279 (1969):

> "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy* v. *Hogan,* 378 U. S. 1. Second is the right to trial by jury. *Duncan* v. *Louisiana,* 391 U. S. 145. Third, is the right to confront one's accusers. *Pointer* v. *Texas,* 380 U. S. 400."

Second, the North Carolina and New Jersey procedures are, if anything, *more* destructive of constitutional rights than that condemned in *Jackson.* For the federal defendant could avoid the death penalty by waiving only his Sixth Amendment right to jury trial. He might thereby save his life and yet have *some* trial—before a judge—at which he could exercise his Fifth Amendment right to contest guilt. North Carolina and New Jersey offer no such middle ground; their price for avoiding the death penalty is a waiver of the right to deny and contest guilt, and thus of *all* procedural protections (including jury trial) subsumed within that right.

But even if it could be said that the right to jury trial is not infringed when the whole of the right to deny and contest guilt is impaired, we submit that there is no basis for concluding that the rule of *Jackson* does not apply

whenever a State encourages a waiver of the Fifth Amendment right not to plead guilty by taxing a not guilty plea with the risk of a death sentence. The Court's careful opinion in *Jackson* relies upon the Fifth Amendment equally with the Sixth Amendment, and the very logic of the *Jackson* decision forbids any distinction between Sixth and Fifth Amendment rights in a fashion which disparages the latter. Palpably, any holding that a procedure which permits avoidance of the death penalty by waiver of the right not to plead guilty is constitutional, although a comparable procedure involving only waiver of the right to jury trial is not, would misconceive the relative importance of the two federal constitutional rights involved in *Jackson.*

The right not to plead guilty, and the correlative right to a hearing at which guilt may be contested, is of the very essence of due process of law. Whatever view one may hold of the Fourteenth Amendment, and of the degree to which it makes applicable to the States the various substantive provisions of the Bill of Rights, there has never been any doubt that an opportunity to a hearing at which to contest guilt is a constitutional essential.

In contrast, it was not until last year that this Court finally declared that the right to a trial by jury in a criminal case was among those rights deemed so essential to civilized jurisprudence that it must be made applicable to the States through the Fourteenth Amendment. *Duncan* v. *Louisiana,* 391 U. S. 145 (1968); *Bloom* v. *Illinois,* 391 U. S. 194 (1968). But the Court also held that the rule of these cases would not be retroactively applied (*De Stefano* v. *Woods,* 392 U. S. 631 (1968)), a ruling which emphasized that, however desirable the right to jury trial, in general, a fair adjudication of guilt could occur without a jury.

Quoting from *Duncan* in *De Stefano,* the Court said: "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." 392 U. S. at 633-634.

One can therefore fairly conclude only that the suggested distinction of *Jackson* reflects either a convoluted appreciation of the relative importance of the rights given by the Fifth and Sixth Amendments or a perverse unwillingness to comply with an unwelcome decision of this Court. As the dissenting judges in *Forcella* wrote: "In the field of federal constitutional law, the decisions of the United States Supreme Court are of course binding upon all state courts. Our clear responsibility is to apply those decisions with due regard for their tenor, principles and goals in analogous situations with the aim of determining a matter as we conscientiously believe that Court would if the case were before it." *Id.,* 52 N. J. 294-295.[10]

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[10] The New Jersey Supreme Court, in rejecting Forcella's contentions, allowed that a contrary ruling would of necessity result in the invalidation of "plea bargaining." *Id.* 52 N. J., at 275-276. The argument, while manifestly uncompelling, is at least familiar; the Government's submission in *Jackson* included the identical point. Brief for the United States, *United States* v. *Jackson,* O. T. 1967, No. 85, pp. 6-7. The argument, we think, is obviously one which manifests disagreement with the *Jackson* holding, not distinction of it.

In any event, the issue of the constitutionality of plea bargaining in general is no more presented here than in *Jackson* or in *Pope* v. *United States,* 392 U. S. 651 (1968). We therefore see no need to labor the obvious point that a procedure which assures a life sentence to the defendant who waives his rights and pleads guilty, while it threatens with death the defendant who dares to exercise those rights, is an entirely different animal from the time-honored practice of plea bargaining in non-capital cases. Whatever the reach of the evolving doctrine forbidding the imposition of a penalty on the exercise of constitutionally guaranteed rights, surely that doctrine forbids what North Carolina and New

The controlling point is simply that, with regard to both the Fifth and Sixth Amendments, the North Carolina and New Jersey practices are functionally identical to the federal procedure which this Court held violative of the Constitution in *United States* v. *Jackson*. Each "needlessly encourages" (390 U. S., at 583) pleas by subjecting the accused who seeks to have his guilt determined by jury trial to an "increased hazard" (*id.*, at 572) of capital punishment. Each "discourage[s]," "deter[s]" and "chill[s]" exercise of the interdependent rights not to plead guilty and to be tried by a jury. *Id.* at 581. And each thereby "needlessly penalizes the assertion of a constitutional right" (*id.*, at 583).

This conclusion follows *a fortiori* from the recent decision in *North Carolina* v. *Pearce*, —— U. S. ——, 23 L. Ed. 2d 656 (1969). There the Court dealt with the problem of increased sentences following a successful appeal and unsuccessful retrial. The Court, acknowledging that it had

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Jersey have done here. We are not on the penumbra of the unconstitutional condition-penalty doctrine where it might be said that the penalty is relatively insubstantial and further that compelling interests of the State justify its imposition. Here the defendant is called upon to bargain his *life* as a condition to exercising his constitutional rights. As Mr. Justice Frankfurter once stated for the Court: "The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant." *Williams* v. *Georgia*, 349 U. S. 375, 391 (1955). For varying exemplifications of the principle, *see*, e.g., *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Stein* v. *New York*, 346 U. S. 156, 196 (1952); *Hamilton* v. *Alabama*, 368 U. S. 52 (1961); *Fay* v. *Noia*, 372 U. S. 391, 439-40 (1963). *Jackson* does not require the wholesale invalidation of plea bargaining. It *does*, however, compel a recognition that the forfeiture of life is a penalty which may not be imposed on the exercise of the fundamental constitutional right to deny and contest guilt on a capital charge. See Note, 54 Cornell L. Rev. 448, 452 (1969).

"never held that the States are required to establish avenues of appellate review," held that once established, those avenues must be kept open and free of unreasoned distinctions. The Court continued:

> "Where . . . the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, 'penalizing those who choose to exercise' constitutional rights, 'would be patently unconstitutional.' *United States* v. *Jackson,* 390 U. S. 570, 581. And the very threat inherent in the existence of such punitive policy would, with respect to those still in prison, serve to 'chill the exercise of basic constitutional rights.' *Id.,* at 582. See also *Griffin* v. *California,* 380 U. S. 690; cf. *Johnson* v. *Avery,* 393 U. S. 483. But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law." (*Id.,* at 4605.)[11]

In these cases, the right to deny and contest guilt—in contrast to the right of appeal—is specifically guaranteed by the United States Constitution. To subject a defendant to

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[11] *Amici,* unlike the defendants in the present cases, did not yield to the pressures to waive their right to trial. Each exercised that right and each has been sentenced to death—a sentence which might have been avoided at the cost of waiver of their federal rights. The question presented in their cases is whether by subjecting them to the death penalty, the state is " 'penalizing those who choose to exercise' constitutional rights, [which] 'would be patently unconstitutional.' " *North Carolina* v. *Pearce, supra,* quoting from *United States* v. *Jackson, supra,* at 581. That question is not presented here and we do not now consider it; it is treated extensively in the petitions for certiorari in *Forcella* (see pp. 19-38) and in *Childs* (see pp. 16-25).

a greater penalty because he has exercised that right is the more flagrantly unconstitutional.

(4) *The Statute Specifies the Death Penalty Unless the Jury Affirmatively Recommends a Lesser Sentence.*

In some states, North Carolina among them, the pertinent statute specifies that the penalty for a capital offense shall be death unless the jury affirmatively recommends a life sentence. The North Carolina Supreme Court thought that that form distinguished such procedures from the federal one invalidated in *Jackson,* where the applicable statute provided for imprisonment unless the jury voted for the death penalty.

The North Carolina Supreme Court offered no explanation as to how this might possibly have any bearing on the applicability of *Jackson's* condemnation of a procedure which unduly encourages the waiver of the constitutional right to deny and contest guilt, and we can think of none. The distinction, we suggest, is entirely semantic.[12] Congress in the Kidnaping Act established a selective process of making individuating judgments by which juries had the option between imposing a death sentence or a sentence of life or less. This is exactly the same option given North Carolina juries by the North Carolina Legislature; and the latter is as unconstitutional as the former. That conclusion does not depend on the phrasing of the jury's role in

[12] If the differences in statutory language were in fact of any consequence, then one would expect that a greater percentage of North Carolina defendants electing to stand trial would be given death sentences than federal capital defendants. The pressure, then, to waive the right to deny and contest guilt and seek the safe harbor of a guilty plea would be *greater* in North Carolina than in a pre-*Jackson* Federal Kidnaping Act case, and the unconstitutionality of North Carolina's procedures would be *a fortiori.*

deciding upon the sentence. Quite the contrary, it follows from the proposition that—however that role may be characterized—any defendant may avoid being subjected to the jury's death-sentencing option—but only at the cost of waiving his constitutional rights.

II.

A Guilty Plea, the Making of Which Was Substantially Motivated by the Threat of Imposition of the Death Penalty, Is Involuntary and Cannot Stand.

Introduction

Having concluded that the North Carolina death penalty statutes are unconstitutional,[13] we are nevertheless impelled to acknowledge, as did the Court of Appeals in *Alford*, that the presence of an unconstitutional sentencing system such as North Carolina's does not, of itself, resolve these cases. As the Court of Appeals said in *Alford*, "a defendant who has pleaded guilty when charged with a capital offense in North Carolina is not necessarily entitled to post-conviction relief as a matter of law." 405 F. 2d, at 347. The court recognized that this Court refrained in *Jackson* from holding that every plea of guilty to a Federal

[13] It should be noted that, effective March 25, 1969, the N. C. Legislature resolved the *Jackson* problem in its statutory scheme by repealing the provision permitting a guilty plea to a capital offense and fixing the penalty upon such a plea at life imprisonment. N. C. Session Laws, 1969, Ch. 117. See *State* v. *Atkinson*, —— N. C. ——, 167 S. E. 2d 241, 258-259 (1969). This resolution *in futuro*, of course, can have no effect on the capital sentencing provisions in force at the time of these defendants'—and of *amici's*—prosecutions, or on their constitutional posture. See note 4, *supra*.

Kidnaping Act charge was involuntary.[14] The question of the validity of such guilty pleas is, we submit, one of fact; it cannot be resolved other than by a full and fair evidentiary hearing, at which a sensitive and probing analysis of the motivations of the plea is made within the framework of the applicable presumptions and rules assigning the burden of proof.

We turn now to the issues controlling the pleas challenged in the cases at bar. In subpart A of this section, we discuss the settled requirement that a guilty plea must be knowing and "voluntary," and the application of that principle to a case in which the threat of the death penalty has played a role in eliciting such a plea. In subpart B, we offer a suggested approach for testing guilty pleas made in cases such as these to determine whether the threat of the death penalty has deprived the plea of its voluntary quality.

A. *The Threat of the Death Penalty May Deprive a Guilty Plea of Its Voluntary Character.*

This Court has long been concerned (*see, e.g., Kercheval* v. *United States,* 274 U. S. 220 (1927)) to insure that guilty pleas be not made involuntarily. The question of voluntariness of a plea is a federal one (*Boykin* v. *Alabama,* —— U. S. ——, 23 L. Ed. 2d 274 (1969), as is any question of the waiver of federally secured rights. *E.g., Douglas* v. *Alabama,* 380 U. S. 415 (1965); *Brookhart* v. *Janis,* 384 U. S. 1, 4 (1966); *O'Connor* v. *Ohio,* 385 U. S. 92 (1966). Special

[14] "[T]he fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily." 390 U. S., at 583.

caution regarding the guilty plea is entirely fitting, for a guilty plea constitutes a waiver of *all* constitutionally secured procedural guarantees (see pp. 15-16, *supra*); thus this Court recently observed that a guilty plea "demands utmost solicitude of which courts are capable" (*Boykin* v. *Alabama, supra,* at 280) to ensure that the waiver is truly voluntary.

The cases prohibiting involuntary pleas do not confine themselves to coercion by physical force or threats of violence; the inducement deemed so great to vitiate a plea "can be 'mental as well as physical;' 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.' *Blackburn* v. *Alabama,* 361 U. S. 199. . . . Subtle pressures (*Leyra* v. *Denno,* 347 U. S. 556; *Haynes* v. *Washington,* 373 U. S. 503) may be as telling as coarse and vulgar ones." *Garrity* v. *New Jersey,* 385 U. S. 493, 496 (1967).

Some pressures are deemed too great to permit their intrusion into the process by which the defendant determines whether to exercise his constitutional right to deny and contest guilt or to enter a plea of guilty. The prospect of an apparently unavoidable deprivation of constitutional rights at trial, for example, may be sufficient to destroy the voluntariness of the plea, as where a defendant pleads guilty in the face of a trial wherein he is threatened by an unconstitutionally obtained confession. *E.g., United States ex rel. Ross* v. *McMann,* 409 F. 2d 1016 (2nd Cir. 1969) (en banc); *United States ex rel. Collins* v. *Maroney,* 382 F. 2d 547 (3rd Cir. 1967); *Smith* v. *Wainwright,* 373 F. 2d 506 (5th Cir. 1967); *Carpenter* v. *Wainwright,* 372 F. 2d 940 (5th Cir. 1967); *Murphy* v. *Wainwright,* 372 F. 2d 942 (5th Cir. 1967); *Doran* v. *Wilson,* 369 F. 2d 505 (9th Cir.

1966); *Ellis* v. *Boles,* 251 F. Supp. 1021 (N. D. W. Va. 1966); *United States ex rel. Cuevas* v. *Rundle,* 258 F. Supp. 647 (E. D. Pa. 1966). Misrepresentations by the prosecutor (for example, as to his ability to insure the defendant a particular sentence) are another example of circumstances which will warrant setting aside a plea of guilty. *E.g., Machibroda* v. *United States,* 368 U. S. 487 (1962); *Walker* v. *Johnston,* 312 U. S. 275 (1941); *Dillon* v. *United States,* 307 F. 2d 445, 449 (9th Cir. 1962); *Teller* v. *United States,* 263 F. 2d 871 (6th Cir. 1959). The same is true of unkept judicial promises of leniency. *E.g., Smith* v. *United States,* 321 F. 2d 954 (9th Cir. 1963); *United States ex rel. Elksnis* v. *Gilligan,* 256 F. Supp. 244 (S. D. N. Y. 1966) (Weinfeld, *J.*); *cf. Workman* v. *United States,* 337 F. 2d 226 (1st Cir. 1964).

Equally impermissible are prosecutorial threats to prosecute the spouse or a close friend of the defendant unless he pleads guilty. *Johnson* v. *Wilson,* 371 F. 2d 911 (9th Cir. 1965); *United States* v. *Glass,* 317 F. 2d 200 (4th Cir. 1963); *Conley* v. *Cox,* 138 F. 2d 786 (8th Cir. 1943); *cf. Teller* v. *United States, supra.* Indeed, statements of the trial judge to the effect that if the defendant elects to stand trial and is convicted, he will be given the maximum sentence have been found to invalidate a guilty plea as a matter of law. *Euziere* v. *United States,* 249 F. 2d 293 (10th Cir. 1957); *United States* v. *Tateo,* 214 F. Supp. 560 (S. D. N. Y. 1963).

Of course guilty pleas, properly interposed, are an essential ingredient of the efficient administration of justice. What these cases teach, however, is that certain kinds of inducements are too pressureful, too insensitive of the right of defendants to elect freely whether or not to stand trial.

Those inducements, for that reason, do not pass constitutional muster. It is in this context that the role of the death penalty must be assessed.

Much of the analysis has already been performed by this Court in *United States* v. *Jackson, supra.* This Court there found that statutes such as North Carolina's "needlessly encourage" (390 U. S., at 583) guilty pleas and, as we show in Part I, *supra,* are unconstitutional. Identification of the potentially coercive force of the death penalty in *Jackson* was in accordance with an increasing recognition that the risks of standing trial are "made particularly perilous in the context of [a] . . . charge with a possible death penalty." *United States ex rel. Ross* v. *McMann,* 409 F. 2d 1016 (2d Cir. 1969) (en banc). *Accord*: *Smith* v. *Wainwright,* 373 F. 2d 506, 507 (5th Cir. 1967) ("He was told that if he pleaded not guilty, the confession would place him in danger of the electric chair"); *Carpenter* v. *Wainwright,* 372 F. 2d 942 (5th Cir. 1967); *United States ex rel. Cuevas* v. *Rundle,* 258 F. Supp. 647 (E. D. Pa. 1966).

It bears emphasis that the constitutionality of a fairly administered system of plea bargaining is not implicated by a recognition of the coercive quality of the threatened imposition of the death penalty. See note 10, *supra.* All that need be determined here is that no defendant may be compelled to gamble with his life to secure his constitutional right to a trial; the state may not use the death penalty as the basis for inducing guilty pleas.

B. *Standards for Determining the Validity of a Potentially Death Penalty-Induced Guilty Plea.*

We begin from the premise that in each of these cases the plea was entered within the framework of a statutory system of differential sentencing in capital cases which is unconstitutional. See Part I, *supra.* The suspicion is in-

evitable, and entirely fitting, that the decision of each defendant to enter a plea of guilty was motivated by a desire to take advantage of the differential sentencing scheme enacted by the North Carolina Legislature and thereby avoid the death penalty. Each of these pleas, then, is constitutionally suspect. See Part II(A), *supra.*

Boykin v. *Alabama,* —— U. S. ——, 23 L. Ed. 2d 274 (1969) compels the setting aside of any such plea where the record lacks "an affirmative showing that [the plea] was intelligent and voluntary." *Id.,* at 279. These cases are undeniably stronger ones for insisting upon such a requirement than was *Boykin,* in which (as the dissenters pointed out, see *id.* at 281) there was no specific allegation that Boykin's plea was involuntary and, certainly, no defects in the statutory framework within which the plea was entered that might raise a presumption (or even suspicion) that his plea was other than voluntary. Yet the Court insisted that any guilty plea, constituting as it does a waiver of *all* constitutionally secured procedural safeguards (see pp. 15-16, *supra*), be supported by an affirmative showing on the record that the plea was knowing and voluntary.[15]

[15] We do not overlook that this Court has not yet determined whether *Boykin* is to be given retroactive application. However that question may be resolved (and presumably *Halliday* v. *United States,* 394 U. S. 831 (1969) (per curiam) suggests that the outcome may well be that it will not be retroactively applied), these pleas should not be allowed to stand. Unlike the *Boykin* and *Halliday* cases, there was here, as we have said, an unconstitutional statutory scheme within which the pleas in each of these cases were entered, as a result of which each is presumptively bad. These circumstances focus our concern as to the constitutionality of these pleas of guilty far more narrowly than is the case as to guilty pleas generally, entered in a less coercive framework. While the Court in *Halliday* could thus conclude that the other remedies available to the relatively rare defendant whose guilty plea may be invalid offered sufficient protection, the same cannot be said in states such as North Carolina where guilty pleas in capital cases are presumptively involuntary because of the coercive force of the differential sentencing system.

In neither of these cases[16] does it affirmatively appear from the record that the plea was other than impelled by a desire to avoid the death penalty, and for that reason neither plea should be allowed to stand.

At the least, a defendant who has entered a plea within a statutory framework such as North Carolina's is entitled to an evidentiary hearing at which the voluntariness of his plea is determined. Conceivably, it might be shown at such a hearing that the plea was the product of wholly proper considerations. It will not do, however, simply to allow the defendant the opportunity to demand such a hearing and impose upon him the customary burden of proof imposed upon one seeking to set aside a conviction. Here the burden must be shifted, for the plea was entered in suspicious circumstances that render it presumptively bad. The likelihood that it was motivated by improper pressures is so great that the burden of showing that it was not must fasten upon the State. Cf. *Miranda* v. *Arizona,* 384 U. S. 436 (1966). This approach recognizes the constitutional values implicit in *Boykin,* while leaving it open to the State to show that, notwithstanding the inevitable suspicion that the plea was the improper product of the unconstitutional differential sentencing system, it was in fact motivated by different, and permissible, considerations.

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[16] In *Alford,* the record in the original state proceedings lends affirmative support to the contrary proposition, and of course that conclusion is fully supported by the collateral proceedings culminating in the determination of the Court of Appeals that the "incentive supplied to petitioner to plead guilty by the North Carolina statutory scheme was the primary motivating force to effect tender of the plea, especially since throughout the proceedings the petitioner has protested his innocence." 405 F. 2d, at 349. In *Parker,* there is nothing in the record of the proceedings at which he entered his plea which indicates that the plea was motivated by anything other than a desire to avoid the death penalty.

Application of these principles to the facts of the present cases leaves no doubt as to the outcome. *Alford* must be affirmed, the court below having affirmatively found after a plenary hearing that the plea was motivated "primarily" to avoid the death penalty and that the defendant had throughout insisted upon his innocence. The record amply supports this factual finding, and no reason appears for this Court to disturb it on appeal. In *Parker*, it does not appear that the courts of North Carolina considered the defendant's claim that his plea was improperly induced by the state's unconstitutional sentencing system in the light of the proper standards for trial of that issue suggested here. To the contrary, the North Carolina Court of Appeals seems simply to have concluded that the plea was voluntary because the North Carolina statute was *not* unconstitutional under *United States* v. *Jackson, supra*, a conclusion which is plainly unsupportable. Thus, the *Parker* case should be vacated and remanded for reconsideration, in light of this Court's determination that the North Carolina statutes provide an unconstitutional inducement to plead guilty, for an evidentiary hearing at which the State will be required to demonstrate affirmatively the voluntariness of the plea under the appropriate federal constitutional standards, or see it set aside.[17]

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[17] Such a holding would not necessarily imply retroactivity of *United States* v. *Jackson*. Compare note 15, *supra*. This Court would be resting its decision upon the long-settled law of the Constitution that an involuntary guilty plea is invalid. In testing the validity of the defendants' pleas, it would be drawing upon the insights and reasoning processes of *Jackson*, not the legal rule of that case, in the same fashion that the Court has applied retroactively the insights of *Miranda*, see *Davis* v. *North Carolina*, 384 U. S. 737 (1966), albeit not its rule, see *Johnson* v. *New Jersey*, 384 U. S. 719 (1966).

We do not develop this retroactivity question here because—whatever view be taken of the retroactivity of *Jackson* in guilty-plea cases such as those of the defendants in the cases at bar—entirely different considerations control the matter of *Jackson's*

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application to persons situated like *amici*, complaining of death sentences which would penalize them for their exercise of constitutional rights. See Petition for Writ of Certiorari in *Forcella and Funicello* v. *New Jersey, supra,* at 36-37; see also note 4, *supra.*